



# Comparison of EU and Swiss derivatives rules

3 November 2015

**C L I F F O R D**  
**C H A N C E**

**BÄR  
& KARRER**

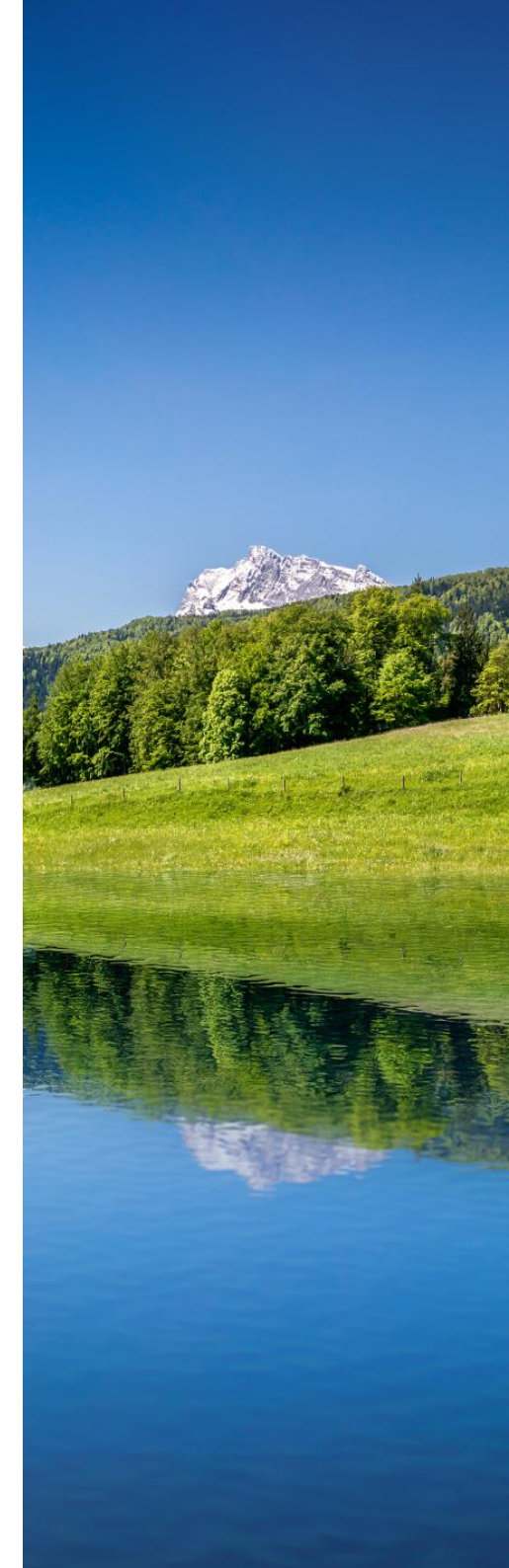
# Contents

Introduction	3
Some key differences	4
Timing of application	5
Scope	6
Clearing and margin rules	7
Reporting and treatment of intragroup transactions	8
Treatment of cross-border transactions	9
Application of derivatives rules by counterparty type	10
Contacts	11

This document is not intended to be comprehensive or to provide legal advice. For more information, speak to one of the lawyers named below.

# Introduction

- The new Swiss regime for the regulation of derivatives trading is expected to come into force on 1 January 2016, subject to a phase-in.
  - In June 2015, the Swiss parliament passed into law the Federal Act on Financial Market Infrastructures (FMIA).
  - In August 2015, the Federal Department of Finance, the Financial Markets Authority (FINMA) and the Swiss National Bank opened a consultation on three implementing ordinances (consultation closed 2 October 2015).
  - The implementing ordinances are expected to be adopted before year end.
- Clifford Chance and Bär & Karrer have produced an outline comparison of key features of the EU and Swiss regimes set out below.
- This comparison assumes:
  - For the EU, implementation of the proposals on clearing and margin as set out in the most recent papers from the EU authorities.
  - For Switzerland, implementation of the proposals set out in the August 2015 consultation.



# Some key differences

<b>Timing:</b>	→ The Swiss rules on clearing, reporting and operational risk mitigation requirements will commence later than the equivalent EU rules and the Swiss rules adopt the BCBS-IO스코 timetable for the phase-in of margin requirements with a modification for variation margin. Unlike the EU rules, the Swiss rules on platform trading and position limits do not have a specified start date.
<b>Product scope:</b>	→ Physically settled FX forwards and swaps are exempt from most of the Swiss rules (except reporting), although they are accounted for when categorising a counterparty. They only benefit from a limited exemption under the EU rules (i.e. they will be carved-out of the requirement to exchange initial margin).
<b>Counterparty categorisation:</b>	→ The Swiss rules divide financial counterparties into two sub-categories (FC+ and FC-) with FC-s being subject to less onerous obligations. In particular they will not be subject to the clearing obligation, platform trading requirements or daily valuation.
<b>Branches:</b>	→ Both the EU and Swiss rules apply to locally incorporated entities and all their foreign branches. The Swiss rules also apply to Swiss branches of foreign entities (unless they are subject to equivalent regulation).
<b>Clearing:</b>	→ The Swiss rules do not have an equivalent to the EU frontloading requirement.
<b>Reporting:</b>	→ The Swiss rules only require single-sided reporting.
<b>Intragroup transactions:</b>	→ Both the EU and Swiss rules provide for an exemption from the clearing and margin requirements for intragroup transactions provided certain conditions are met. The Swiss rules do not require prior notification to, or approval from, the relevant regulator nor do they include a requirement, in the context of cross-border transactions, for the foreign entity to be established in an "equivalent" jurisdiction.
<b>Cross-border transactions:</b>	→ In addition for providing for the recognition of foreign CCPs and trade repositories, the Swiss rules include a substituted compliance regime and a cross-border exemption which exempt counterparties from complying with the Swiss rules if the foreign entity is established in a jurisdiction with an equivalent regulation and, under that regulation, the transaction is not subject to the clearing obligation or risk mitigation requirements.

# Comparison of EU and Swiss derivatives rules

## Timing of application

	EU	Swiss
<b>Clearing</b>	<p>First RTS on mandatory clearing adopted in August 2015 (for interest rate derivatives in G4 currencies) and, subject to no objection from European Parliament and the Council will be phased in over a three year period following publication in the Official Journal.</p> <p>ESMA has submitted final draft RTS to the Commission on the mandatory clearing of certain index CDS products.</p>	<p>When CCPs have been authorised or recognised to clear classes of OTC derivatives under FMIA, FINMA may determine whether to impose mandatory clearing of any of those derivatives.</p> <p>Clearing will be phased-in over a period of 6 to 12 months depending on counterparty type from the date a clearing determination is introduced.</p>
<b>Margin</b>	<p>The ESAs have proposed that the requirements for the margining of uncleared OTC derivatives will be phased-in from 1 September 2016 in line with the international framework adopted by BCBS-IOSCO.</p>	<p>The August consultation proposes that the requirements for the margining of uncleared OTC derivatives will be phased-in from 1 September 2016 in line with the international framework adopted by BCBS-IOSCO (but with a 6 month delayed application of variation margining for the second wave of counterparties).</p>
<b>Reporting</b>	<p>The reporting requirements for derivatives under EMIR applied from 12 February 2014, with additional requirements applying from 11 August 2014.</p>	<p>Reporting will be phased in over a period of 6 to 12 months depending on counterparty type. FC+ and CCPs will be the first to become subject to the reporting requirement 6 months after the date the first trade repository is licensed (if Swiss) or recognised (if foreign).</p>
<b>Operational risk mitigation</b>	<p>The operational risk mitigation requirements under EMIR applied from 15 March 2013 or, in some cases, 15 September 2013.</p>	<p>Confirmations, reconciliation, dispute resolution and portfolio compression will be phased in over a period of 6 to 12 months from the entry into force of the FMIA depending on counterparty type. FC+ and NFC+ will be the first to become subject to these requirements 6 months after the entry into force of the FMIA.</p> <p>Daily valuation will apply 6 months after the entry into force of the FMIA for FC+ and NFC+ (does not apply FC- and NFC-).</p>
<b>Platform trading</b>	<p>Under MiFID2/MiFIR, requirements could be phased-in from 3 January 2017 (but this is subject to consultation by ESMA following the adoption of the regulatory technical standards on clearing).</p>	<p>Application delayed until an international consensus emerges on the implementation of platform trading requirements.</p> <p>A foreign exchange or multilateral trading system will need to be recognised by FINMA if it admits Swiss participants to trade. This rule does not capture, however, indirect trades in exchange-traded derivatives, if no Swiss entity participates directly.</p>
<b>Position limits</b>	<p>Under MiFID2/MiFIR, from 3 January 2017 (subject to prior adoption of limits by national competent authorities).</p>	<p>Application delayed until an international consensus emerges on the implementation of position limits.</p>

# Comparison of EU and Swiss derivatives rules

## Scope

	EU	Swiss
<b>Product scope</b>	<p>“Derivatives” – financial instrument as set out in C(4) to C(10) of Annex 1 of MiFID1. This definition does not cover securitised derivatives.</p> <p>Most requirements only apply to OTC derivatives (although currently this term captures third country exchange-traded derivatives). The reporting obligation, however, applies to both OTC and exchange-traded derivatives.</p> <p>Initial margin (IM) is not required to be exchanged for: (i) physically settled FX forwards and swaps; and (ii) exchanges of principal under currency swaps. All other requirements (including the requirement to exchange variation margin (VM)) apply to these types of derivatives.</p>	<p>“Derivatives” - financial contracts whose value depends on one or more underlying instruments and do not constitute spot transactions.</p> <p>Structured products, securitised derivatives, structured deposits and certain physically settled commodity derivatives will be carved out.</p> <p>Exchange-traded derivatives (which includes derivatives traded over a multilateral trading system) and physically settled FX forwards and swaps are only subject to the reporting requirements.</p>
<b>Counterparty categorisation</b>	<p>Counterparties are either financial counterparties (FCs) or non-financial counterparties (NFCs).</p> <p>NFCs are further divided into two sub-categories depending on whether the NFC takes positions in OTC derivative contracts which exceed a specified clearing threshold (NFC+s) or not (NFC-s).</p> <p><u>NFC+ / NFC- calculation:</u> A NFC will be a NFC+ if its positions and those of any other NFCs in its group in OTC derivatives exceed one of the following thresholds: EUR 1 billion for credit and equity derivatives and EUR 3 billion for interest rate, FX, commodity and other derivatives. Hedging transactions are excluded.</p>	<p>Counterparties are either financial counterparties (FCs) or non-financial counterparties (NFCs).</p> <p>Both categories are further divided into small and non-small i.e. FC+, FC-, NFC+ and NFC-.</p> <p><u>FC+ / FC- calculation:</u> A FC will be a FC- if its gross notional value of outstanding OTC derivatives transactions is below CHF 8 billion (approx EUR 7.4 billion) at a group level. Hedging transactions must be included.</p> <p><u>NFC+ / NFC- calculation:</u> A NFC will be a NFC- if its gross notional value of outstanding OTC derivatives transactions for a particular class of derivatives is below a specified threshold at a group level: CHF 1.1 billion (approx EUR 1.01 billion) for credit and equity derivatives and CHF 3.3 billion (approx EUR 3.03 billion) for interest rate, FX, commodity and other derivatives. Hedging transactions are excluded.</p>
<b>Application to branches</b>	<p>The rules generally apply to entities established in the EU (the exception being non-EU AIFs managed by EU authorised AIFMs) including all their foreign branches.</p> <p>The rules do not apply to EU branches of non-EU entities (unless trading with another EU branch of a non-EU entity and both entities would be FCs if established in the EU).</p>	<p>The rules apply to entities with a seat in Switzerland including all their foreign branches.</p> <p>The rules also apply to Swiss branches of foreign market participants provided they are not subject to equivalent regulation.</p>

# Comparison of EU and Swiss derivatives rules

## Clearing and margin rules

	EU	Swiss
<b>Clearing</b>	<p>Requirement to clear certain classes of OTC derivatives with an authorised or recognised CCP. ESMA determines which classes of OTC derivatives should be subject to the clearing obligation.</p> <p>The clearing obligation will be phased-in by counterparty type. The frontloading requirement introduces an element of backloading depending on counterparty type.</p> <p>Pension scheme arrangements have a temporary exemption from the clearing obligation for hedging transactions until 16 August 2017 (which could be extended for a further 1 year).</p>	<p>Requirement to clear certain categories of OTC derivatives with an authorised or recognised CCP. FINMA determines which categories of OTC derivatives should be subject to the clearing obligation.</p> <p>The clearing obligation will be phased-in by counterparty type. Only new trades are subject to the clearing obligation (i.e. no backloading).</p> <p>Pension schemes and investment foundations have a temporary exemption from the clearing obligation for hedging transactions until 16 August 2017.</p>
<b>Margin</b>	<p>Margin requirements apply to all non-centrally cleared OTC derivatives, with the exception of IM which is not required to be exchanged for physically settled FX forwards and swaps and exchanges of principal under currency swaps.</p> <p><u>Thresholds</u> Bilateral threshold: threshold allowed for IM, capped at EUR 50 million at group level. No threshold for VM.</p> <p>De minimis threshold for IM: after phase-in period, de minimis threshold of EUR 8 billion at group level (including FX).</p> <p>Minimum transfer amount: must not exceed EUR 500,000 for the sum of VM, IM and any other collateral.</p> <p><u>Phase-in</u> VM: 1 September 2016 for counterparties with an aggregate average notional amount of non-centrally cleared OTC derivatives at a group level above EUR 3 trillion. 1 March 2017 for other counterparties.</p> <p>IM: phased in between 2016 and 2020, with full compliance subject to EUR 8 billion de minimis threshold as of 1 September 2020.</p>	<p>Margin requirements apply to all non-centrally cleared OTC derivatives except physically settled FX forwards and swaps.</p> <p><u>Thresholds</u> Bilateral threshold: threshold allowed for IM, capped at CHF 50 million (approx EUR 46 million) at group level. No threshold for VM.</p> <p>De minimis threshold for IM: after phase-in period, de minimis threshold of CHF 8 billion (approx EUR 7.4 billion) at group level (including FX).</p> <p>Minimum transfer amount: IM and VM payments waived if amount to be exchanged is worth less than CHF 500,000 (approx EUR 460,000).</p> <p><u>Phase-in</u> VM: 1 September 2016 for counterparties with an aggregate month-end average gross position of non-centrally cleared OTC derivatives at the group level above CHF 3 trillion (approx EUR 2.76 trillion) and 1 September 2017 for other counterparties in respect of trades entered into after 1 March 2017.</p> <p>IM: phased in between 2016 and 2020, with full compliance subject to CHF 8 billion (approx EUR 7.4 billion) de minimis threshold as of 31 August 2020.</p>

# Comparison of EU and Swiss derivatives rules

## Reporting and treatment of intragroup transactions

	EU	Swiss
<b>Reporting</b>	<p>Requirement to report all new, modified or terminated derivative contracts to a registered or recognised trade repository no later than the working day following the conclusion, modification or termination of the contract.</p> <p>Dual-sided reporting – both counterparties (if subject to the requirement) must report the transaction.</p> <p>Delegated reporting permitted.</p> <p>Reporting obligation in force for all types of counterparties.</p>	<p>Requirement to report all new, modified or terminated derivative contracts to an authorised or recognised trade repository no later than the working day following the conclusion, modification or termination of the contract.</p> <p>Single-sided reporting – only one counterparty is required to report (the rules specify which counterparty has the reporting obligation depending on the types of counterparty involved). An FC or NFC+ will have to report trades with NFC-s. Reporting does not apply to trades between two NFC-s, but an NFC- may still be required to report trades with a non-Swiss counterparty if the non-Swiss counterparty does not itself report the trade.</p> <p>Delegated reporting permitted.</p> <p>The reporting obligation will be phased-in by counterparty type, starting 6, 9 or 12 months after the first trade repository is authorised or recognised.</p>
<b>Intragroup transactions</b>	<p>The rules provide for an intragroup exemption from the clearing obligation and the margin requirements.</p> <p>In addition to the conditions that both counterparties must be included in the same consolidation on a full basis and are subject to appropriate centralised risk evaluation, measurement and control procedures, the following conditions apply:</p> <ul style="list-style-type: none"> <li>– if one counterparty is established in a non-EU jurisdiction, that jurisdiction must have been declared equivalent under Article 13 of EMIR;</li> <li>– in respect of the exemption from margin requirements, there must be no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between counterparties; and</li> <li>– prior notification must be given to, or prior authorisation received from, the relevant regulators.</li> </ul> <p>Note, to reflect the lack of any Article 13 equivalence decisions, the RTS for the first clearing obligation include an exemption for intragroup transactions between EU and non-EU counterparties (provided certain conditions are met).</p>	<p>The rules provide for an intragroup exemption from the clearing obligation and the margin requirements.</p> <p><u>Clearing obligation</u>: intragroup transactions are exempt from the clearing obligation provided that the parties are included in the same consolidation perimeter; are subject to appropriate centralised risk evaluation, measurement and control processes; and the transactions do not aim to circumvent the clearing obligation.</p> <p><u>Margin requirements</u>: intragroup transactions are exempt from the margin requirements if the parties are included in the same consolidation perimeter; are subject to appropriate centralised risk evaluation, measurement and control processes; there are no legal or factual impediments to the prompt transfer of own funds or the repayment of liabilities; and the arrangements do not have the objective of avoiding a collateral exchange.</p> <p>Note: the application of a stay under insolvency law is not an obstacle to transfer of funds or repayment of liabilities.</p> <p>No requirement for prior notice to be given to a regulator or for approval to be granted.</p>



# Comparison of EU and Swiss derivatives rules

## Treatment of cross-border transactions

	EU	Swiss
<b>Cross-border transactions</b>	<p>Transactions between an EU and a non-EU counterparty are subject to the clearing, reporting and risk mitigation requirements. However, the EU rules contain some provisions with the purpose of facilitating cross-border compliance.</p> <p><u>Recognition of foreign CCPs and trade repositories:</u> The clearing obligation and the reporting requirement can be satisfied by using a foreign CCP or trade repository provided it has been recognised under EMIR. To date, CCPs from Australia, Japan, Hong Kong and Singapore have been recognised.</p> <p><u>Mechanism to avoid duplicative or conflicting rules:</u> counterparties will be deemed to have fulfilled their obligations under EMIR in respect of transactions where at least one of the counterparties is established in a non-EU jurisdiction which has been declared equivalent under Article 13 of EMIR. To date, there have been no equivalence decisions under Article 13 of EMIR.</p> <p>The clearing and risk mitigation requirements also apply to transactions between two non-EU counterparties who would have been subject to those requirements if established in the EU but only if the contract has a direct, substantial and foreseeable effect in the EU or the application is necessary or appropriate to prevent evasion of EMIR (as defined by RTS).</p>	<p>Transactions between a Swiss and a foreign counterparty are subject to the clearing, reporting and risk mitigation requirements. However, the Swiss rules contain some provisions with the purpose of facilitating cross-border compliance.</p> <p><u>Substituted compliance regime:</u> counterparties may satisfy their duties under the Swiss rules by applying foreign regulations. This substituted compliance regime will be available if: (a) the foreign regulations are deemed equivalent to the Swiss rules; and (b) with respect to the clearing and reporting obligations, the counterparties use foreign CCPs or trade repositories that are recognised by FINMA.</p> <p><u>Recognition of foreign CCPs and trade repositories:</u> the Swiss clearing obligation and the reporting requirements can be satisfied by using a foreign CCP or trade repository provided it has been recognised under the Swiss rules.</p> <p><u>Cross-border exemption:</u> cross-border transactions are exempt from the Swiss clearing obligation if the foreign counterparty is established in a jurisdiction with an equivalent regulation and the transaction is not subject to clearing requirements in that foreign jurisdiction. The same exemption applies to the margin requirements but not in respect of the reporting requirement or the operational risk mitigation requirements to the extent that they can be carried out unilaterally.</p> <p>The Swiss rules do not apply to derivatives transactions entered into between two foreign counterparties.</p>

# Comparison of EU and Swiss derivatives rules

## Application of derivatives rules by counterparty type

EU			
Obligation	Applies to:		
	FC	NFC+	NFC-
Platform trading	✓	✓	✗
Clearing	✓	✓	✗
Margin	✓	✓	✗
Reporting	✓	✓	✓

### Operational risk mitigation:

Confirmations	✓	✓	✓
Portfolio reconciliation	✓	✓	✓
Portfolio compression	✓	✓	✓
Dispute resolution	✓	✓	✓
Daily valuation	✓	✓	✗

Swiss				
Obligation	Applies to:			
	FC+	NFC+	FC-	NFC-
Platform trading	✓	✓	✗	✗
Clearing	✓	✓	✗	✗
Margin	✓	✓	✓	✗
Reporting	✓	✓	✓	✓*

### Operational risk mitigation:

Confirmations	✓	✓	✓	✓
Portfolio reconciliation	✓	✓	✓	✗
Portfolio compression	✓	✓	✓	✓
Dispute resolution	✓	✓	✓	✓
Daily valuation	✓	✓	✗	✗

\* See above for reporting by NFC-s.

# Contacts

## Clifford Chance



**Chris Bates**  
Partner  
Clifford Chance  
T: +44 20 7006 1041  
E: chris.bates  
@cliffordchance.com



**Habib Motani**  
Partner  
Clifford Chance  
T: +44 20 7006 1718  
E: habib.motani  
@cliffordchance.com



**Caroline Dawson**  
Senior Associate  
Clifford Chance  
T: +44 20 7006 4355  
E: caroline.dawson  
@cliffordchance.com



**Stephanie Peacock**  
Lawyer  
Clifford Chance  
T: +44 207006 4387  
E: stephanie.peacock  
@cliffordchance.com

## Bär & Karrer



**Rashid Bahar**  
Partner  
Bär & Karrer  
T: +41 58 261 50 00  
E: rashid.bahar  
@baerkarrer.ch



**Peter Hsu**  
Partner  
Bär & Karrer  
T: +41 58 261 50 00  
E: peter.hsu  
@baerkarrer.ch



**Urs Brügger**  
Partner  
Bär & Karrer  
T: +41 58 261 50 00  
E: urs.bruegger  
@baerkarrer.ch



**Roland Truffer**  
Partner  
Bär & Karrer  
T: +41 58 261 50 00  
E: roland.truffer  
@baerkarrer.ch

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2015

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications